



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 219 OF 2013**

VELOS ENTERPRISES LIMITED.....1<sup>ST</sup> PETITIONER

WANANCHI GROUP HOLDINGS LTD.....2<sup>ND</sup> PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT

CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT

**RULING NO. 2**

1. In my ruling made in this matter on the 23<sup>rd</sup> of August 2013, I dismissed the petitioners' application for conservatory orders dated 23<sup>rd</sup> April 2013 for the reasons set out in that ruling. I also directed that the matter should be mentioned on the 27<sup>th</sup> of August 2013 for the purpose of taking directions on the hearing of the petition, and granted leave to the petitioners, on the application of their Counsel, Mr. Wekesa, to lodge an appeal against my ruling.
2. The petitioners have now moved this court by their application dated 5<sup>th</sup> September 2013 for orders:
  1. *That there be a stay of execution and proceedings arising from ruling of the High Court Constitution Petition 219 of 2013 dated and delivered on the 23<sup>rd</sup> August 2013 pending the interpartes hearing and the determination of the application herein.*
  2. *That there be a stay of execution and proceedings arising, from the ruling of the High Court Constitutional Petition 219 of 2013 dated and delivered on the 23<sup>rd</sup> August 2013 pending the hearing of the applicants' intended meritorious Appeal and the main petition.*
  3. *That the costs of the applicants do abide the results of the intended Appeal.*
3. The application, which is supported by an affidavit sworn by Mr. Simon Wekesa, the petitioners' Counsel, is expressed to be brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and to be based on the following grounds:
  1. *That the applicants have an arguable and meritorious appeal.*
  2. *The High Court in its ruling delivered on 23<sup>rd</sup> August 2013, dismissed the applicants*

- application dated 23<sup>rd</sup> April 2013 which application sought to obtain interim injunctive a conservatory orders against the respondents from unconstitutionally continuing to demolish the property belonging to the petitioners pending, hearing and determination of the main petition.*
3. *As a result of the said ruling, the applicants have been exposed to significant and imminent financial losses and a further breach of their constitutional rights which issues are at the crux of the constitutional petition Ref HCC 219 of 2013 before the Honourable Court.*
  4. *The intended appeal has merit and the applicants have filed a Notice of Appeal dated 4<sup>th</sup> September 2013 and have further filed a request for typed proceedings of even date.*
  5. *The applicants are under a real apprehension that unless this Hon. Court issues orders of stay of execution and proceedings in High Court Constitutional Petition No. 219 of 2013 the respondents will proceed to demolish their constitutionally protected property rendering the intended meritorious appeal and main petition nugatory and moot.*
  6. *That it is in the interest of justice that these orders issued to allow the applicants an opportunity to assert their lawful property rights.*

### **The Petitioners' Submissions**

4. Mr. Wekesa submitted that following the dismissal of the petitioners' application dated 23<sup>rd</sup> April 2013, the petitioners were seeking stay of execution and stay of proceedings in the petition pending hearing and determination of their appeal; that the petitioners had applied for the proceedings and filed a notice of appeal; that they have an arguable appeal and are seeking a stay of execution as they are apprehensive that their property may be demolished before they can exercise their right of appeal.
5. Mr. Wekesa relied on a newspaper cutting annexed to his affidavit to support his submission that the petitioners' property would be demolished if an order of stay was not granted. Though the petitioners did not include a draft memorandum of appeal as an annexure to their application, the grounds of their intended appeal are set out in Mr. Wekesa's affidavit in support of the application.
6. Mr. Wekesa argued therefore that in light of the petitioners' intended appeal, it was in the interests of justice that the orders for stay of execution and proceedings in the matter be issued to enable the petitioners assert their lawful property rights.

### **The Response**

7. Counsel for the respondents, Mr. Milimo, opposed the application on four main grounds which were set out in the respondents' Grounds of Opposition dated 9<sup>th</sup> September 2013.
8. The first ground related to the affidavit sworn in support of the application. Mr. Milimo took the position that an advocate is an unqualified person to swear an affidavit on behalf of a client; that he cannot move away from the Bar and take the witness stand by giving affidavit evidence on matters of fact; that the matters he depones to were contested in the main application and it would be irregular for the Advocate to depone to these facts as that compromises his position on the matter. He contended therefore that the affidavit, particularly paragraphs 5, 6 and 7 thereof, was improperly before the court and should be struck out. In the event that the court agreed with this submission, Mr. Milimo urged that the entire application be struck out as it would then be unsupported by evidence and could not therefore stand.
9. The second argument made by the respondents is that the court does not have jurisdiction to grant or entertain the orders sought. Mr. Milimo contended that the application had been brought under Order 42 Rule 6 of the Civil Procedure Rules 2010; that this Order deals with appeals to the High Court from Magistrates' courts or tribunals inferior to the High Court; that it does not deal with appeals from this court to the Court of Appeal. In his view, such orders as the petitioners were seeking could only properly be sought under Rule 5(2) (b) of the Court of Appeal Rules; and this court only had jurisdiction under Order 42(6)(5) to grant a temporary stay on an informal

application following which the applicant could seek orders from the Court of Appeal.

10. The respondents also oppose the application on the basis that there is no positive order capable of execution in the ruling of 23<sup>rd</sup> August 2013; that all that the Court did was to dismiss the petitioners' application for an injunction; that the order of dismissal did not require the petitioners to do or fail to do anything. It was the respondents' contention therefore that the application before the court was misconceived and without merit. Mr. Milimo relied in support on the decision of the Court of Appeal in **Attorney General vs Law Society of Kenya and Another Court of Appeal Civil Appeal No. Nai 144 of 2009 (Unreported)** and asked that the application be dismissed with costs.
11. With regard to the petitioners' prayer for stay of the petition pending appeal against the decision on the interlocutory application, Mr. Milimo argued that there was a consent in place with regard to the hearing of the petition. He contended that, like a contract, the said consent could not be set aside except on the very clear conditions for setting aside consent orders, which conditions had not been presented before the court.
12. In his reply to the respondents' submissions, Mr. Wekesa argued that the petitioners were seeking stay of execution by the respondents of the enforcement notices. With regard to his affidavit in support of the application, Mr. Wekesa seemed to concede that he could not aver to matters of fact as Counsel and he asked the court that the part of his affidavit that remained after paragraphs 5, 6, and 7 are struck out be admitted.

### **Determination**

13. As I understand it, the petitioners are seeking two things. First, they wish to have a stay of execution of the order of the court in this matter made on 23<sup>rd</sup> August 2013. In that order, as correctly argued by the respondent, there was no positive order made that can be the subject of an order of stay. What I did in my ruling was decline to grant the conservatory orders sought by the petitioners.
14. I agree with the words of Law V.P. in **Western College of Arts and Applied Sciences –vs- Orange (1976) KLR 63** cited with approval by the Court of Appeal in **Attorney General –Vs- Law Society of Kenya** (supra) that:

***'In the instant case the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or restrain by an injunction. Similarly, the order of the superior court which is the subject matter of the stay application is not capable of execution as it did not order any party to do anything or to refrain from doing anything or to pay any sum. The application for stay of execution is to that extent misconceived.'***

15. What the petitioners are asking the court to stay is a dismissal order, which is not an order capable of execution, or of being stayed. I therefore agree with the respondents that this application is totally misconceived and must therefore fail.
16. The respondents have made several other arguments with regard to this application which I need not go into in detail. Suffice to observe that the affidavit in support of the application is not properly before the court, a matter that is tacitly conceded by Counsel for the petitioner. Even were the court minded to admit the affidavit sworn by Mr. Wekesa, shorn of the averments of fact contained in paragraphs 5, 6, and 7, the rest of the affidavit would be a shell that could not possibly support the petitioners' application.
17. The petitioners have also sought a stay of proceedings in this petition, a prayer that was

vehemently opposed by the respondents on the basis that there had been a consent that the petition should proceed to full hearing. I note from the record that the parties did indeed take directions on the hearing of the petition by consent. At any rate, the petitioners did not place before me at the hearing of this application any reasons why there should be a stay of proceedings in this matter.

18. For the above reasons, the application dated 5<sup>th</sup> September 2013 is dismissed with costs the respondents.

19. The parties are hereby invited to comply with the directions issued by consent on 27<sup>th</sup> August 2013 with a view to proceeding with the hearing of this petition.

**Dated Delivered and Signed at Nairobi this 10<sup>th</sup> day of September 2013**

**MUMBI NGUGI**

**JUDGE**

**Mr. Wekesa instructed by the firm of Sichangi Partners & Co. Advocates for the Petitioners**

**Mr. Milimo instructed by the firm of Milimo, Muthoni & Co. Advocates for the respondents.**